INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statement of the case	1
Statutory provision sustaining jurisdiction	2
Statute of the State involved	2
Date of judgment and of application for appeal	3
Cases believed to sustain jurisdiction	3
Raising the Federal question	3
The tender clause	4
The coinage clause and the Federal statutes enacted pursuant thereto	6
Freedom of contract, due process of law	7
Unreasonable discrimination and denial of equal protection of the laws	8
Statement of grounds upon which it is contended the questions involved are substantial	9
The tender clause	9
Decision below misconstrues tender clause	13
Cases cited in opinion not determinative	14
Coinage clause and Federal statutes violated	16
Section 580a is repugnant to that freedom of contract guaranteed by the 14th Amendment	17
Section 580a denies "The Equal Protection of the Laws", provided by the 14th Amendment	18
Opinion of the court below appears in the statement opposing jurisdiction and motion to dismiss or affirm	22

Table of Cases Cited.

Baily v. *Gentry*, 1 Mc. 164, 13 Amer. Dec. 484	9, 11
Bennett v. *Superior Court*, 5 Cal. App. (2d) 13	13
Birkhofer v. *Krumm*, 27 Cal. App. (2d) 513	12, 15
California Powder Works v. *Davis*, 151 U. S. 389	15
Colorado National Bank v. *Bedford*, 84 L. Ed. 730	4
Eigner v. *Texas*, 84 L. Ed. 756	4

Page

Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1 17
Gulf, etc., Ry. Co. v. *Ellis*, 165 U. S. 150 19
Hartford S. B. I. Ins. Co. v. *Harrison*, 301 U. S. 459 .. 18
Honeyman v. *Jacobs*, 306 U. S. 539 15
Jay Burns Baking Co. v. *Bryan*, 264 U. S. 504 17
Kirkpatrick v. *Stelling*, 100 Cal. App. Dec. 335, 98 Pac. (2d) 566 4
Louis K. Liggett Co. v. *Baldrige*, 278 U. S. 105 17
Louis K. Liggett Co. v. *Lee*, 288 U. S. 517 17
Louisville Gas & E. Co. v. *Coleman*, 277 U. S. 32 18
New State Ice Co. v. *Liebmann*, 285 U. S. 262 17
New York, etc., v. *Kleinert*, 268 U. S. 646 15
Ogden v. *Saunders*, 12 Wheat. 213 .... 6, 10, 16, 20
People v. *District Court of Appeal*, 193 Cal. 19 4
People v. *Walker*, 76 Cal. App. 192 4
Richmond Mortgage & Loan Corp. v. *Wachovia B. & T. Co.*, 300 U. S. 124 15
Southern Railway Co. v. *Kentucky*, 274 U. S. 76 15

STATUTES CITED.

Bancroft, "History of the Formation of the Constitution of the United States", page 241 10
Clark, "The Internal Debts of the United States", page 5, et seq. 21
Code of Civil Procedure of the State of California (Statutes of California, 1933, Chap. 642, p. 1672):
Section 580a 2
Section 682 19
Section 684 19
Section 692 19
Section 726 (Chap. 793, Stats. 1933, p. 2118 13
Constitution of the United States:
Article I, Section 8 16
Article I, Section 10 5
14th Amendment 7, 8
Judicial Code, Section 237a, as amended by the Act of February 13, 1925 and the Act of January 31, 1928 (28 U. S. C. A. 344a and 861a) 2

Page

Massachusetts Act of November 4, 1785, Massachusetts Laws (1700-1800), page 251 14
Massachusetts Act of November 15, 1786 (Acts and Resolves of Massachusetts, 1786-1787) 10
New Jersey Statute of 1786 11
Revised Statutes, par. 3588, 31 U. S. C. A., par. 452; also c. 25, Title III, par. 43 (b) (1), 48 Stat. 52, as amended June 5, 1933, c. 48, par. 2, 48 Stat. 113, 31 U. S. C. A., par. 462 ..... 7, 16
South Carolina Act of March 12, 1785, 20 So. Car. Rep., page 80, Vol. 1, Desaus. Eq. (1 S. C. Equity), page 73 14
South Carolina Act of October 12, 1785, No. 1293 14
Story, "Commentaries on the Constitution of the United States", Vol. 2, page 242, Secs. 1371 and 1372 9
Virginia Law of 1782 (Hening's Laws of Virginia, Vol. XI, page 178) 11
Watson on the Constitution, Vol. 1, page 765 10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 222

W. J. KIRKPATRICK,

Appellant,

vs.

J. ALICE STELLING,

Appellee.

JURISDICTIONAL STATEMENT.

Statement of the Case.

Appellant, as assignee of appellee's promissory note secured by a deed of trust on real property in California, brought this action on the note in the Superior Court for Santa Clara County for a balance alleged to be due thereon after default and a sale of the property constituting the security. The note and deed of trust were executed July 7, 1934. The note was for $45,925, payable one year from date "in lawful money of the United States of America." The complaint alleged that the security for the note was duly sold on January 8, 1938; that the net proceeds of the sale were applied on the note; that after the proceeds were so applied there remained, and still remains, due a balance of $13,164.13, for which judgment was sought.

Defendant demurred on the ground, among others, that the complaint failed to allege that the property was sold

for its fair market value as of the day of sale, or what such fair market value was on that date, as required by Section 580a of the Code of Civil Procedure of California, enacted in 1933, said statute providing that the excess of such valuation over the actual sale figure must be applied as a payment on the balance due on the note. Appellant resisted the demurrer on the ground that Section 580a is invalid because repugnant to the provisions of the Federal Constitution and statutes hereinafter set forth. The trial court sustained the validity of Section 580a, sustained the demurrer without leave to amend, and entered judgment in favor of appellee.

Appellant appealed. The District Court of Appeal affirmed the judgment, expressly sustaining the validity of Section 580a prospectively as against appellant's contention that the statute is invalid under the Federal Constitution and statutes. Section 580a has uniformly been held void retroactively, the said court correctly stated, as being an impairment of contract. The contract clause is not pertinent to the instant suit and was not raised. The Supreme Court of California denied a hearing.

Statutory Provision Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of this Court is Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C. A. 344 (a), 861a).

Statute of the State Involved.

The statute, the validity of which is involved, is Section 580a of the Code of Civil Procedure of the State of California (Statutes of California, 1933, Chap. 642, p. 1672,) the pertinent portion of which reads:

> "Whenever a money judgment is sought for the balance due upon an obligation for the payment of which

a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, the plaintiff shall set forth in his complaint the entire amount of the indebtedness which was secured by said deed of trust or mortgage at the time of sale, the amount for which such real property or interest therein was sold and the fair market value thereof at the date of sale and the date of such sale. Upon the application of either party made at least ten days before the time of trial the court shall, and upon its own motion the court at any time may, appoint one of the inheritance tax appraisers provided for by law to appraise the property or the interest therein sold as of the time of sale. Such appraiser shall file his appraisal with the clerk and the same shall be admissible in evidence. Such appraiser shall take and subscribe an oath to be attached to the appraisal that he has truly, honestly and impartially appraised the property to the best of his knowledge and ability. Any appraiser so appointed may be called and examined as a witness by any party or by the court itself. The court must fix the compensation of such appraiser, not to exceed five dollars per day, and expenses for the time actually engaged in such appraisal, which may be taxed and allowed in like manner as other costs. Before rendering any judgment the court shall find the fair market value of the real property, or interest therein sold, at the time of sale. The court may render judgment for not more than the amount by which the entire amount of the indebtedness due at the time of sale exceeded the fair market value of the real property or interest therein sold at the time of sale with interest thereon from the date of the sale; provided, however, that in no event shall the amount of said judgment, exclusive of interest after the date of sale, exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured by said deed of trust or mortgage."

Date of Judgment and of Application for Appeal.

The judgment of the District Court of Appeal was made and entered January 23, 1940. The Supreme Court of the State of California denied a petition for a hearing on March 21, 1940. The decision and judgment of the District Court of Appeal became final on March 23, 1940.

People v. *Walker*, 76 Cal. App. 192;
People v. *District Court of Appeal*, 193 Cal. 19.

The application for appeal was presented and the appeal allowed on June 13, 1940.

The decision of the District Court of Appeal is not yet officially reported; it is unofficially reported in 100 Cal. App. Dec. 335, 98 Pac. (2d) 566.

Cases Believed to Sustain Jurisdiction.

The cases believed to sustain the jurisdiction of this court are:

Eigner v. *Texas* (No. 635, October Term, 1939, decided May 6, 1940), 84 L. Ed. Adv. Ops. 756;
Colorado National Bank v. *Bedford* (No. 719, October Term, 1939, decided April 22, 1940), 84 L. Ed. Adv. Ops. 730, 732.

Raising the Federal Questions.

In the trial court, the plaintiff raised the point that the statute is repugnant to the Federal Constitution. This is shown by a Stipulation which was filed during consideration of the demurrer and before it was decided and judgment entered, and which appears in the Transcript on Appeal from the trial court to the Appellate Court, reading in part:

"*Stipulation.*

A Demurrer to the Amended Complaint having been heretofore filed, argued, and submitted, one of the

grounds of said Demurrer being that the Complaint does not comply with the requirements of Section 580a C. C. P., and the Plaintiff having argued that said Section 580a is unconstitutional as being in violation of Article I, Section 10 of the Constitution of the United States, providing that no state shall make anything but gold and silver coin a tender in the payment of debts, * * * and it being the intent of both parties to appeal in the event the decision of this Court is against him or her and to test solely the constitutionality of said Section 580a upon said appeal the Defendant waives the other grounds of demurrer and in consideration of said waiver the Plaintiff states to the Defendant and to the Court that he is willing to stand upon the Complaint and does not desire to further Amend said Complaint.

It is agreed that this Stipulation may be made a part of the Court's Order sustaining or overruling said Demurrer."

In the California District Court of Appeal, the appellant raised the Federal questions in briefs:

The Tender Clause.

Opening Brief, p. 11

"Madison, in 'The Federalist', No. 44, said:

'The *power* to make anything but gold and silver a *tender in payment of debts*, is withdrawn from the states on *the same principle* with that of issuing *paper currency.*'"

Oral Argument of C. H. White, filed on November 3, 1939, as a brief, pp. 9 and 10:

"First, then, let us test 580a by the Constitution itself, by the plain wording and meaning of the constitutional clause. It provides that nothing but gold and silver coin may by state statute be made a tender or

medium for paying a debt. All Justices and eminent counsel in *Ogden v. Saunders* agreed that this clause meant, as Marshall expressed it (12 Wheat., at p. 336) a prohibition against 'making property a tender in payment of debts.' And as Marshall there said, and all agreed, the clause *'unquestionably'* makes such a law void of *prospective* force. Now, 580a provides that the money borrowed may be paid by the money bid and accepted at the trustee's sale, *or* the valuation *figure*, whichever is higher. Is this excess of the valuation figure over the sale figure, this excess which is to pay the debt *pro tanto*, gold or silver coin? Is it national metallic money? No one would so contend. Is 580a any less a tender law because it makes the *valuation figure of the property owned by a third party purchaser* at the trustee's sale a substitute for legal tender in paying the debt? On the contrary, that makes it a tender law of the most vicious kind."

The final decision herein discusses at length the question as to whether or not the statute is repugnant to the said tender clause, stating the point was raised by appellant in his briefs in said court.

The Coinage Clause and the Federal Statutes enacted pursuant thereto.

Appellant's Opening Brief, p. 40:

"*Ogden v. Saunders*, 12 Wheat. 265 (Justice Washington):

'• • • It declares, that "No state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts". These prohibitions associated with the powers granted to Congress "to coin money, and to regulate the value thereof, and of foreign coin", most obviously constitute members of the same family, being upon the same subject, and governed by the same policy.' "

Reply Brief, 8 and 9:

> " 'United States notes shall be *lawful money, and a legal tender in payment of all debts,* public and *private, within the United States,* except for duties on imports and interest on the public debt.' (R. S. par. 3588, 31 U. S. C. A. par. 452.)
>
> '*All coins and currencies* of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be *legal tender for all debts,* public and *private,* * * *' (May 12, 1933, c. 25, Title III, par. 43 (b) (1), 48 Stat. 52, as amended June 5, 1933, c. 48, par. 2, 48 Stat. 113, 31 U. S. C. A. par. 462.
>
> '* * * *Every obligation,* heretofore or *hereafter* incurred, whether or not any such provision is contained therein or made with respect thereto, *shall be discharged* upon payment, dollar for dollar, *in any coin or currency,* which at the time of payment is *legal tender for public and private debts.* * * *' (June 5, 1933, c. 48, par. 1, 48 Stat. 113, 31 U. S. C. A. par. 463.)' "

It was stipulated in the trial court (see stipulation p. 4 above) that an appeal would be taken by the party losing on the demurrer and that the appeal would "test solely the constitutionality of said Section 580a."

Freedom of contract, due process of law. (14th Amendment.)

Appellant's Reply Br., pp. 44, 45:

> "The basic error and wrong of substituting a valuation for money in payment of a debt is that the creditor who purchases at the sale must stand the loss in every instance where he is unable to resell the property at the figure the jury fixed; and he must stand the loss with no chance to recoup any part of it where a third party is the purchaser and the jury decides the public *ought*

to have paid more at such sale. The creditor must stand as a loss the difference between what the jury thinks the public *ought* to have paid and what it actually paid. These various losses under our statute are as certain to be forced on the creditor as anything can be certain. To inflict such losses on a lender of money violates first principles of right and wrong. He must bear the losses though he has committed no breach of contract, has done no wrong. This is unreasonable and inequitable and ought not to be sanctioned, even if there were no specific prohibition against it in the national Constitution, and a creditor relied only on the right to freedom of contract unhampered by *unreasonable* restrictions, as guaranteed by the 14th Amendment."

Unreasonable discrimination and Denial of equal protection of the laws. (14th Amendment.)

Appellant's Reply Brief, pp. 46, 47:

"Considering the substitution of appraisements for money separate and apart from the constitutional clause that specifically prohibits it, such scheme is cumbersome, costly, and unjust to the creditor when honest but erroneous appraisements are made. Moreover, there is no reason to believe that the plan would be accompanied with less fraud and corruption now than it was in the years prior to 1789, as described by Justices Story, Marshall and others. Yet the jury's valuation must be received in every instance by the creditor *at par;* he must accept it, 'dollar' for dollar, the state 'dollar' as the equivalent of the national dollar. The creditor holding real estate security given him by act of the debtor is not by our state statute *equal* with other creditors so far as being forced to credit only national money realized out of security, real or personal, obtained by them under other state statutes, or chattel security given by act of the party. The lender on real estate is discriminated against as to medium of payment. * * *

Wallace v. *Zinman,* 200 Cal. 585 * * *."

The final decision herein states that appellant raised both "freedom of contract guaranteed by the due process clause" and "equal protection of the laws." *

STATEMENT OF GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

The Tender Clause.

This is the *first* case ever before this Court, so far as counsel and the court below, as it states, "after its independent research," can ascertain, where the validity of any State law similar to said Section 580a, or any other appraisal or tender law, has been made a point at issue under the *tender clause* of Article I, Section 10, of the Constitution. Indeed, it appears to be the first time that the meaning and effect of the tender clause has ever been a direct issue in any reported decision of this Court.

The State court holds that the clause should be construed as if it read:

> No State shall * * * make any Thing but gold and silver Coin a Tender in Payment of *unsecured* Debts.

Although this point appears to be novel in this Court, it was heretofore decided by the Supreme Court of Missouri in accord with appellant's contention herein in *Baily* v. *Gentry*, 1 Mo. 164; 13 Amer. Dec. 484. (See opinion of Justice Cook therein.)

The history and purpose of the tender clause is summarized by Mr. Justice Story in his "Commentaries on the Constitution of the United States," Vol. 2, page 242, Secs.

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* The decision is entirely on Federal grounds, since the court construes said Section 580a to be without time limit.

1371 and 1372, quoted in full in the opinion below. It was brought about not only by the evils resulting from the promiscuous issuance of paper money, but also, as he states from "• • • laws of another character, *well known under the appellation of tender laws, appraisement laws* • • •" etc., whereby "• • • property of any sort • • • either real or personal, might be tendered by the debtor in payment of his debts • • •" *Sec. 1371* (Italics ours.) He thus summarizes its object and purpose in said Section 1372:

> "• • • Accordingly, it has been uniformly held, that the prohibition applied to all future laws on the subject of tender; and, therefore, no *State legislature can provide that future pecuniary contracts may be discharged by anything but gold and silver coin.*" (Italics ours.)
>
> "The evil which produced the prohibitory clause in the Constitution of the United States, was the practice of the states of making bills of credit, and in some instances appraised property, 'a legal tender.' "
>
> *Watson, on the Constitution,* Vol. 1, page 765, quoting Madison's Writings, page 160.
>
> "Madison classified the evils to be remedied under four heads, of depreciated paper as a legal tender, of property substituted for money in payment of debt, of laws for paying debts by installments, and of the occlusions of the courts of justice."
>
> 1 *Bancroft, "History of the Formation of the Constitution of the United States,"* page 241.

See also *Ogden* v. *Saunders,* 12 Wheat. 213, Justices' opinions at pages 265, 288, 306, 328, and 336; also arguments of Daniel Webster at page 247 and Wheaton at page 216.

Examples of appraisal and tender laws which brought about the adoption of the tender clause are the South Carolina Statute of October 12, 1785, No. 1293; the Massachusetts Act of November 15, 1786 (Acts and Resolves of

Massachusetts, 1786-1787); the Virginia Law of 1782 (Hening's Laws of Virginia, Vol. XI, page 178); and the New Jersey Statute of 1786.

The said South Carolina law provided that before any lands or chattels "seized or levied upon by virtue of any decree, execution or process, * * * shall be exposed to sale," the property must be appraised by three appraisers, chosen by the parties or the local court, who shall fix such valuation as they swear is "fair and equitable;" that if the debtor upon demand of the creditor did not tender property so appraised in payment of the debt, the property so levied upon might be sold and if no bid was made equaling three-fourths of such valuation, the sale could be completed but the creditor was compelled to allow three-fourths of such valuation as a credit on the debt.

The Massachusetts tender law, *supra,* among other things, provided that "if any suit shall hereafter be commenced within this Commonwealth against any debtor, being a Citizen thereof, such debtor, * * * is hereby authorized to tender real or personal estate in full satisfaction of the debt," at a valuation to be made by three appraisers chosen by the parties and the local court.

The Missouri law, which was held to violate the tender clause in *Baily* v. *Gentry, supra,* allowed property to be applied to the discharge of debts at two-thirds of its appraised value.

Said Section 580a of the California Code of Civil Procedure is substantially similar in its requirements, operation, and effect to the laws above referred to which caused the enactment of the tender clause. Consequently, it comes within its prohibition.

There is one difference between the said South Carolina and California laws, in that under the South Carolina Act only seventy-five per cent of the official valuation of the property tendered was applied on the debt, whereas, under

the California Act one hundred per cent of the official valuation of the property must be applied on the debt. Thus, the California statute in its pertinent substance provides that whenever a "money" judgment is sought for the balance due upon an obligation for the payment of which a trust deed or mortgage with power of sale upon real property was given as security, following the exercise of such power of sale, the court shall have an appraisement of the property made, find the fair market value thereof, and "may not render judgment for more than the amount by which the debt exceeds the said market value * * *."

The conclusion is inescapable that the effect of said statute in many cases will be to prevent a creditor, lending lawful money of the United States upon condition that it be paid in full in like lawful money, from having such condition fulfilled. In other words, in all cases where the property constituting the security is sold at public sale, as required by law, for an amount less than the total due, and the court valuation is in excess thereof, said Section 580a compels him to take said valuation of property in discharge of his debt to the extent of the excess of said valuation over the actual public sale price. The result is that if he purchases the property at such sale he suffers the *pro tanto* discharge of his obligation, not in money, but in a "theoretical market value." *Birkhofer* v. *Krumm*, 27 Cal. App. (2d) 513, at 539, certiorari denied, 305 U. S. 653, 83 L. Ed. 423. If a third person buys the property, the creditor must suffer a loss of the amount by which the court's valuation exceeds the sale price. In either case, the debtor's *"pecuniary" obligation to the creditor is to that extent cancelled by something other than money!*

That the purpose and effect of said California law is to generally permit only a portion, and not the whole of an indebtedness to be repaid notwithstanding the debtor may

be wealthy and well able to pay in full, is candidly conceded by the California Court.

> "The statute (Sec. 580a) attempts to so affect the contract that only a portion of the indebtedness may be recovered * * *."

Bennett v. *Superior Court*, 5 Cal. App. (2d) 13, at 14; and this, says the court,

> "notwithstanding the borrower of the money may well be able to pay in full."

Decision Below Misconstrues Tender Clause.

The court below concedes that the tender clause was enacted to prohibit a State "from passing any statute providing, directly or indirectly, as to past or future debts, that the debtor may tender in total or partial discharge thereof property at an appraised valuation." But it attempts to avoid it by first making the novel and unprecedented assertion that the tender clause applies only to unsecured and therefore not to secured debts. The word "debts" as used in the legal tender clause is *unqualified;* it is not limited to some debts; it therefore must be taken to apply to *all* debts. Unable to find judicial precedent to support its qualification, the court below endeavors to justify its conclusion by the observation that Justice Story's discussion of the tender clause has no direct reference to debts secured by real property. But Justice Story made no distinction whatsoever between secured and unsecured debts. On the contrary, he emphasized in his Section 1372, quoted in the Opinion below, that the tender clause, together with the prohibitions as to the States coining money and emitting bills of credit "are founded upon the same general policy"; i. e., "to provide a fixed and uniform value throughout the United States, by which commercial and other dealings of the citizens, as well as the moneyed trans-

actions of the government, might be regulated," with the result that "no State legislature can provide that future pecuniary contracts may be discharged by anything but gold and silver coin." The conclusion is inescapable that it was Story's view, as well as that of its authors, that the tender clause applied to all "dealings," "pecuniary contracts," and hence to all money obligations or debts.

Incidentally, the South Carolina law of 1785, hereinabove partly quoted, used the word "decree" and expressly referred to "every sale, by virtue of any decree or execution * * *." That the "decree" in said South Carolina valuation law referred to a real estate foreclosure decree, scarcely needs authority, but is certain and plain from 20 So. Car. Rep., page 80, Vol. 1 Desaus. Eq. (1, S. C. Equity), page 73, "An Act for the more speedy and effectual enforcing the execution of *decrees in the Court of Chancery.*— Passed 12th March, 1785;" and from the same volume, page 85, an Act ratified February 19, 1791, giving the Courts of Common Pleas jurisdiction in certain suits on debts secured by *real estate mortgages,* to foreclose the mortgagor by a foreclosure sale "from his equity of redemption in as complete a manner as if the same had been foreclosed in a Court of Chancery." Likewise, the Massachusetts law of 1786 expressly refers to and includes any "suit." That the word "suit" included realty mortgage suits is apparent from the Act of November 4, 1785, Massachusetts Laws (1780-1800), page 251,

> "* * * in real actions on mortgage, or bargain and sale with defeasance, the judgment shall be conditional upon payment within two months of the amount due."

Cases Cited in Opinion Not Determinative.

The court below further endeavors to justify its conclusion that Section 580a does not violate the tender clause by arguing that this Court has of late upheld similar statutes

in *Richmond Mortgage & Loan Corp* v. *Wachovia B. & T. Co.*, 300 U. S. 124, and *Honeyman* v. *Jacobs*, 306 U. S. 539, stating that they are "conclusive in the present case."

A brief but complete answer to this contention may be made in the observation that *these cases cannot be conclusive on the legal tender point because the legal tender clause was neither cited nor considered in either of those cases.* Even the court below admits this, viz:

> "It is true that they involve the contract clause and not the tender clause of the Constitution * * *."

As this question was not raised in said two cases, this Court had *no jurisdiction* there to determine it.

Southern Railway Co. v. *Kentucky*, 274 U. S. 76;
California Powder Works v. *Davis*, 151 U. S. 389, 393;
New York etc. v. *Kleinert*, 268 U. S. 646;

Not only is the *Richmond etc. Corp.* v. *Wachovia etc. Co.* case, *supra*, not in point because the tender clause was neither invoked nor passed upon, but for the further reason, as this Court therein emphasized, there was in North Carolina an alternative remedy "equally effective for the enforcement of the obligation" (P. 129), so that there was preserved to the mortgagee the right for which he had contracted, " * * * namely, *payment in full.*" (P. 130.) (Our italics.) But there is no such alternative remedy in California whereby the lender may be assured ultimate "payment in full," because under a companion statute governing foreclosure in judicial proceedings Sec. 726 Code of Civil Procedure (Chap. 793, Stats. 1933, p. 2118), the recovery is likewise limited by appraisal. This "most important difference between the situation in North Carolina and that in California" is pointed out by the California Appellate Court in *Birkhofer* v. *Krumm*, 27 Cal. App. (2d) 513, at page 539, which quotes from and distin-

guishes the said *Richmond etc. Corp.* case. Defendant Krumm therein petitioned this Court for certiorari, basing his petition on the said *Richmond* case, but the petition was denied, 305 U. S. 653; 83 L. Ed. 423.

The *Honeyman* case, *supra,* is based upon and quotes from the said *Richmond* case, but it did not consider nor decide the legal tender point. It merely held that the *contract clause* was not violated by the New York statute because it appeared as a matter of record without conflict therein that "the value of the property is equal to the debt of the plaintiff" (P. 54), so that as plaintiff received all he was entitled to under his contract it necessarily followed that he suffered no impairment of his contract.

COINAGE CLAUSE AND FEDERAL STATUTES VIOLATED.

Inherently related to and associated with the tender clause, is Section 8 of Article I of the Federal Constitution, which grants exclusively to Congress the power "to coin money, regulate its value, and of foreign coin," (Mr. Justice Washington in *Ogden* v. *Saunders,* 12 Wheaton, at page 265), and Federal statutes enacted pursuant thereto, providing what shall be a tender "in payment of *all* debts, public and private, within the United States." (R. S. par. 3588, 31 U. S. C. A. par. 452; also c. 25 Title III, par. 43 (b) (1), 48 Stat. 52, as amended June 5, 1933, c. 48, par. 2, 48 Stat. 113, 31 U. S. C. A. par. 462.)

There is also the Federal statute which expressly provides that *money obligations shall be only discharged, dollar for dollar,* with that currency which at the time is legal tender, viz:

> "Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon

payment, dollar for dollar, in any coin or currency, which at the time of payment is legal tender for public and private debts * * *." (June 5, 1933, c. 48, par. 1, 48 Stat. 113, 31 U. S. C. A. par. 462.)

The National Government, then, has exclusive power to determine what shall be money, what may be loaned as money, and what may discharge an obligation to return such money borrowed; i. e., what shall be a tender in payment of such debt. A State may not directly or indirectly invade this domain with legislation such as Section 580a, which in effect substitutes property at an appraisal for money, or State valuation dollars for United States dollars.

SECTION 580a IS REPUGNANT TO THAT FREEDOM OF CONTRACT GUARANTEED BY THE XIV AMENDMENT.

A State cannot, " 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them' "

Louis K. Liggett Co. v. *Baldrige*, 278 U. S. 105;
Jay Burns Baking Co. v. *Bryan*, 264 U. S. 504, 513;
Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1;
New State Ice Co. v. *Liebmann*, 285 U. S. 262;
Louis K. Liggett v. *Lee*, 288 U. S. 517.

Appellant does not question the right of the State to reasonably limit the rates of interest through usury laws; to impose statutes of limitation reducing and curtailing the time for the enforcibility of loans; to enact procedural legislation providing the manner in which loans may be enforced; to protect the borrower against over-reaching and fraud; in times of emergency so requiring, to enact *moratoria* delaying *for the period of duration of the emer-*

gency only the collectibility of loans with proper compensating provisions; and, even insolvency laws which entirely wipe out one's debts provided he turn over all of his property for ratable distribution to his creditors.

But while the State may constitutionally enact the foregoing multifarious laws of a regulatory character with respect to loans, it cannot go further and enact an *absolute prohibition* against persons contracting to loan money upon security on the condition that such loan be repaid in money. In short, it cannot constitutionally enact legislation such as Section 580a which in effect declares to a lender—"You may enter into a contract to lend another a certain amount of lawful money of the United States, but you cannot, if it is secured by a trust deed or mortgage on real estate, enforce its full collection in like lawful money of the United States." In other words, the direct effect of this statute is to prevent a person from making a contract to grant a loan in lawful money, upon condition that it be repaid in full in like lawful money.

As said by the Court in the *Fairmont Creamery Co.* case, *supra:*

> "• • • we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public."

SECTION 580a DENIES "THE EQUAL PROTECTION OF THE LAWS" PROVIDED BY THE XIV AMENDMENT.

> "It may be generally said that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances • • •."
>
> *Hartford S. B. I. Ins. Co.* v. *Harrison,* 301 U. S. 459;
>
> *Louisville Gas & E. Co.* v. *Coleman,* 277 U. S. 32.

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon *some reasonable ground,*—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection."
> *Gulf, etc. Ry. Co.* v. *Ellis,* 165 U. S. 150, at 166.

In the case last cited, a Texas statute was held void which imposed an attorney's fee upon railway companies which should fail to pay certain claims within a given time. The vice of such statute as declared by this Court was that:

> "* * * the statute arbitrarily *singles out one class of debtors,* and punishes it for a failure to perform certain duties,—*duties* which are *equally obligatory* upon all debtors * * *," at 158. (Italics ours.)

Similarly, the vice of Section 580a is that it singles out one class of creditors, to wit: *secured creditors,* and punishes such class by placing an obstacle in the way of the full payment of the obligations due them which it does not impose upon *unsecured* creditors. In this respect it discriminates in favor of *unsecured* creditors and against *secured* creditors. Thus under the California law an unsecured creditor can attach and execute upon all the real property that his debtor owns, and *still have judgment for the full amount of any remaining deficiency!* (Secs. 682, 684, 692, Code of Civil Procedure.) But if a creditor obtains a mortgage or deed of trust as security for his obligation, such creditor is barred by Section 580a, regardless of the fact that his debtor may be solvent, from obtaining judgment in money for the full balance unpaid after sale of the security.

Section 580a not only discriminates in favor of wholly

unsecured creditors, but even in favor of a certain class of secured creditors, to wit: creditors who are given personal property as security. Thus creditors secured by *pledge* or *mortgage* of chattels may still foreclose and *obtain full judgment for the deficiencies.* Neither Section 580a nor any other law of California prevents such collection in full in money.

There is no reasonable ground for such discrimination. As said in the decision of this Court last quoted, the ultimate duties of the borrowers in each case, whether real, personal or no property is given as security, are "duties which are equally obligatory upon all debtors * * *"; namely, the repayment in full of each loan upon maturity in United States lawful money. Correspondingly, the rights of all classes of lenders in this respect are fundamentally the same; that is to say, irrespective of the character of security which lenders may receive, *all* are equally entitled to the full payment of their loans.

As was pointed out by Daniel Webster in his argument in *Ogden* v. *Saunders,* 12 Wheat. 213, at 247, one of the principal reasons for the writing of the Constitution was to eradicate a vicious system of paper money and tender laws which "threatened to beggar every man of property, and ultimately to ruin the country. * * *" He further declared:

> "* * * The relation between debtor and creditor, always delicate, and always dangerous, whenever it divides society, and draws out the respective parties into different ranks and classes, was in such a condition in the years 1787, '88 and '89, as to threaten the overthrow of all government; and a revolution was menaced, much more critical and alarming than that through which the country had recently passed. The object of the new Constitution was to arrest these evils; to awaken industry, by giving security to prop-

erty; to establish confidence, credit and commerce, by salutary laws, to be enforced by the power of the whole community."

The opinion below quotes Justice Story as authority for the well recognized historical fact that the tender and appraisal legislation during and following the Revolutionary War was productive of much fraud, chicanery, and profligacy. If this was true then of laws which permitted debtors to cheat their creditors; which excused borrowers from repaying their lenders; which invited false appraisals and perjured valuations; it is equally true now with respect to Section 580a which is substantially similar to those original appraisal statutes. That such legislation is an invitation to and productive of perjured appraisals is established not only by the experience of the past, but of the present as well. Any legislation which in effect tells people they need not keep their promises or perform their obligations is bound to have a baneful effect on public morality.

In conclusion, it is submitted that the grounds of appeal are substantial, particularly in view of the absence of decisions of this Court upon the tender clause. But it also appears to be a case of transcending importance, not merely because the statute questioned affects the sum of one and a half billion dollars loaned in California upon real estate (Reports of Federal Reserve Bank of San Francisco, and of the California Building and Loan and Insurance Commissioners), and, as a precedent, possibly thirty-five billion dollars throughout the nation ("The Internal Debts of the United States," Clark, page 5 *et seq.*), but because the statute challenged represents the invasion of a State into and encroachment upon that exclusive domain of the national government with respect to the medium of payment and discharge of all pecuniary obligations.

The opinion of the District Court of Appeal for the First Appellate District appears at page 1 of the statement opposing jurisdiction and motion to dismiss or affirm.

Respectfully submitted,

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